No. 14,109

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUIS E. WOLCHER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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OPINION BELOW.

The District Court wrote no opinion.

JURISDICTION.

THE PLEADINGS AND FACTS DISCLOSE THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The appellant, Louis E. Wolcher, was indicted on October 4, 1950, in the District Court for the Northern District of California, Southern Division, on one

count, charging that he willfully and knowingly attempted to evade and defeat a large part of the income and victory taxes due and owing by him for the fiscal year ended June 30, 1944, in the amount of $30,949.81, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b). (R. 3, 4.)[1]

On January 18, 1951, the defendant entered a plea of "not guilty" to the indictment. (R. 5.) Trial was held in the District Court before the Honorable Louis E. Goodman on August 31, 1953, and the jury returned a verdict finding the defendant guilty as charged in the indictment. (R. 6.) The District Court adjudged the defendant guilty as charged and convicted, and ordered him committed to the custody of the Attorney General for imprisonment for a period of two years and to pay a fine in the sum of $10,000.00 and the cost of prosecution. (R. 17.)

The appellant filed a motion for a judgment of acquittal (R. 6) and a motion for a new trial (R. 17), which motions were both denied.

A timely notice of appeal was filed by appellant on September 4, 1953. (R. 20-21.) The Government concedes that this Court has jurisdiction to hear and decide this appeal.

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[1]This is a second trial. The previous trial was held on May 4, 1951, and this Court reversed on November 17, 1952, *Wolcher v. United States,* 200 F. (2d) 493.

STATUTE INVOLVED.

Title 26, Internal Revenue Code: Section 145(b).

"PENALTIES

* * * * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

QUESTIONS PRESENTED IN THIS CASE.

1. Did prejudicial error occur in the instructions given by the District Court to the jury, or in the rejection of appellant's proposed instruction?

2. Did the District Court err in sustaining objections to questions asked of appellant on direct examination?

3. Did the District Court abuse its discretion in denying appellant's motion to reopen the case?

STATEMENT OF THE CASE, INCLUDING FACTUAL MATTERS INVOLVED.

On October 15, 1944, Louis E. Wolcher filed with the Collector of Internal Revenue at San Francisco, California, his individual income tax return for the fiscal year ended June 30, 1944. (R. 40.) Appellant testified that he had operated the Advance Automatic Sales Company for thirty years, and that it sold at wholesale coin operated machines, candy, peanuts, cigarette vending machines, pinball machines, and juke boxes. He further stated that up until "it became illegal to have slot machines" this concern had sold slot machines. (R. 345.) Wolcher stated that during the period covered by the indictment he was identified with the following partnerships: Bay Building Company, California Contract Company, the Exhibit Furniture Company, the Fun Center Arcade, Gold Coast, Happyland Arcade, Playhouse, Purity Sweets, the Showboat, and the Silver Rail, and that he also owned individually Caruso's, the Funland Arcade, and the Sacramento Arcade. (R. 346.) The appellant further testified that liquor was sold by the glass for consumption on the premises at the Silver Rail, the Gold Coast, and the Showboat. (R. 346.) He then added that members of his family were identified with Tommy's Joint, Valencia Tavern, and the Victory Bar. (R. 346-347.)

A photostatic copy of Wolcher's income tax return was received in evidence as Government's Exhibit No. 1 (R. 40) and showed that during the year in-

volved in this case appellant reported no gross income from sales of liquor at wholesale, except for $3,000 he obtained from a profit made on liquor he bought from the Barton Distributing Company. The profit so reported did not involve a violation of O.P.A. price ceilings. (R. 87, 323, 325.)

The Government's proof of understated income in this case consisted of testimony that over-ceiling payments for whisky were made direct to Wolcher himself or were made to other persons who passed the money on to Wolcher. A series of Government witnesses[2] gave evidence which establishes its case in this respect. It was sometimes necessary to trace the money through one or two intermediaries before proving that it reached Wolcher.

The whisky involved was received through San Francisco liquor wholesalers who were licensed as required by law. The almost universal practice, with the exception of Rathjen Bros., was that the purchaser would give a check for the ceiling price of the liquor, which was received by the legitimate wholesaler, and would pay the additional over-ceiling amount in cash directly, or through other persons, to Wolcher.

Wolcher did not put the over-ceiling payments in his bank account, where he deposited the regular

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[2]Ackerman (R. 179); Castle (R. 202); Caviglia (R. 210); Clemens (R. 278); Fuentes (R. 223); Gando (R. 263); Hafford (R. 247); Kirby (R. 269); Lombardo (R. 219); Norman (R. 195); and Owens (R. 72).

receipts of his businesses. These over-ceiling payments were the only whisky receipts he handled in this fashion. In at least one instance, the currency so received went into the safe at the Silver Rail Restaurant. (R. 350.)

After the Government had established its case in chief by clear-cut evidence that appellant had received a large amount of income from over-ceiling whisky transactions, Wolcher admitted such over-ceiling transactions. (R. 366, 410.) Appellant testified that he charged over-ceiling prices on the distribution of liquor at wholesale to concerns in which he or his family were not interested, but contended that sales to concerns in which he or his family were interested were made at ceiling prices. (R. 315.)

Wolcher's testimony involved seven purchases and sales of whisky totaling some 5,138 cases at an average sale price of approximately $60 per case, or transactions involving over $300,000. (R. 410.) By far the greater part of this whisky was sold by Wolcher at over-ceiling prices to individuals or to business concerns in which he and his relatives had no ownership interest, although approximately 1500 cases or more (appellant was not sure of the number[3]) were distributed through bars in which Wolcher or his relatives were interested.

As noted above, Wolcher admitted receiving the proceeds from over-ceiling sales of liquor and his

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[3]In the previous trial he estimated 900 cases were distributed through bars in which his relatives were interested. (See p. 7 of appellee's brief, No. 12,992.)

entire defense was to contend that he made no profit. In reply to a question as to why appellant went into a transaction involving over $300,000 without intending to make any profit, appellant stated (R. 411):

> "I didn't intend for it to reach any such mammoth proportions; I didn't intend for any such thing to happen, and that is the reason it was stopped. When it began to reach into big figures it was stopped immediately. The thing was running away from me. Instead of just getting whisky for a friend of his, it turned out that he was getting whisky for three friends of his, and getting ninth removed from that, and that is why it was stopped."

Wolcher testified in very considerable detail as to his version of the transactions between himself and one William Gersh. He asserted that he had known Gersh for a good many years and identified him as the publisher of a New York or a Chicago trade paper called The Cash Box, devoted entirely to coin machines. Wolcher stated that Gersh was not in the whisky business and, further, that he had no correspondence regarding liquor transactions with Gersh, although he had a lot of correspondence with Gersh on other matters. (R. 354-392.) Wolcher also testified that he made over-ceiling payments of approximately $150,000 to Gersh. He testified that he paid Gersh $20 a case on the first two or three shipments and $25 a case on the later shipments. (R. 361, 362.) He also testified that he sent money to Gersh in many different ways: by check, by cash through the mail, by

express, by delivering it to Gersh personally, and by "just stuffed the money in an envelope without registering it." (R. 401-404.)

Wolcher asserted that he sent Gersh $5,000 in the month of June 1943, $3,300 in cash in August 1943, and $5,000 in cash the latter part of August. (R. 358-359.) He further stated that he sent a draft for $12,500 in September 1943. (R. 396.) In the same month, he received back from Gersh a check for $5,000, which became an offsetting entry in Wolcher's books, posted in the suspense account. (R. 363, 364.) Neither the original entry in his books nor the offsetting entry showed the transaction as a whisky purchase or sale. (R. 395.)

Wolcher stated that he talked to Gersh both face to face and over the telephone, and asserted that he delivered to Gersh $30,000 in cash and a bank draft for $30,000. He testified that he carried the cash to New York in his wife's cosmetic case (R. 401), but he later could not recall whether it was he or his wife who carried it (R. 402).[4]

In regard to cashing the $30,000 draft which appellant took to New York for the purpose of delivering to Gersh, his testimony was not too clear on cross-examination as to whether he was with Gersh in the bank or not when the draft was cashed. However, in the first trial (No. 12,992, R. 536) he stated:

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[4]In the first trial, no mention was made of how this $30,000 in cash was carried to New York. (No. 12,992, R. 451.)

"Yes, I recall going to the bank with Mr. Gersh some time after the $10,000, after he got the $10,000, at which time he got $20,000, put it in an envelope and threw it to me, and he says, 'Lou, it is your money, you might as well carry it.' So we walked across—I got the envelope and walked across the street to Mr. Gersh's office, and gave it back to him there."

Wolcher claimed that in December 1943 or January 1944 he had sent Gersh $30,000 in cash by express. (R. 402.) He stated that the express shipment was only insured for a very nominal sum; that it was not described as money; and that he received no receipt for same. (R. 403.)

Appellant admits that at about this same time he received from Gersh a check for $22,750 and another check for $2,000, and about $5,250 worth of merchandise, and the $5,000 previously referred to, or a total of some $35,000. (R. 405.) Appellant further admits that the financial transactions between him and Gersh, on which there is a written record in the form of drafts, checks, and memorandum, totaled $47,500 sent by Wolcher to Gersh and only $35,000 was returned by Gersh to the appellant, leaving a difference of $12,500 in the hands of Gersh. (R. 406.) All of the other amounts claimed by appellant to have been sent to Gersh were carefully handled so that there was no record. (R. 406.)

Appellant stated that he had jotted figures on the back of an envelope which purported to represent

cash sent to Gersh and that he threw away the memorandum at the end of each shipment. (R. 437, 438.) He added that he had thrown away the envelope because he didn't want to leave any telltale trails behind him. (R. 405.) (He didn't explain how figures on an envelope could be used to convict him of O.P.A. violations.)

To have a story which was at all plausible, Wolcher had to explain the fact that Gersh sent him money in large amounts. The jury had the right to consider the improbability that a man of Wolcher's resources and with thirty years of business experience would send a large amount of money across the continent, have it returned to him, and send it back again—all for the asserted purpose of not making a record—when he was establishing such a record in the process.

Appellant stated that his wife was not present when he paid the $60,000 previously mentioned to Gersh. (R. 402.) Moreover, he admitted that in his dealings with Gersh he did not keep any regular books as to the standing of their accounts. Appellant did not call Gersh as a witness.

In addition to the six shipments of liquor allegedly bought through Gersh, appellant testified that in May 1943 he made an over-ceiling payment of $10,000 cash to one Ray Worthy in connection with a purchase of 500 cases of Old Brook whisky from Rathjen Bros. in San Francisco. Worthy died in 1949, and was

unavailable as a witness at the trial. (R. 349, 350, 351.)

SUMMARY OF ARGUMENT.

The instructions of the trial court, when read in their entirety, correctly defined the rights of the Government and the accused and fully and fairly presented the law applicable to the case. The comments of the court during the instructions were within the bounds of judicial propriety, and the jury was left free to perform its fact finding function.

The sustaining of objections by the Government to questions asked of appellant on direct examination did not prejudice the appellant inasmuch as the substance of the conversation with Gersh held in the spring of 1943 was later given and made a part of the record.

The denial of the appellant's motion to reopen the case was a proper exercise of the trial court's discretion, for the appellant was aware of the fact that Gersh had been called as a witness at the first trial of the case and was fully aware of Gersh's testimony on that occasion. Appellant had every opportunity to place Gersh under subpoena, as he admitted he had a conversation with him in the past twelve months and knew his whereabouts. The court pointed out to appellant that this application was not timely in any sense of the word and denial of the defendant's motion to reopen was a proper exercise of the discretion of the trial court.

ARGUMENT.

I.

PRELIMINARY STATEMENTS APPLICABLE TO ALL QUESTIONS INVOLVED AND TO ALL ASSIGNMENTS OF ERROR.

Scope of Review on Questions of Insufficiency of the Evidence.

It is a well-established principle that an appellate court should indulge in all reasonable presumptions in support of the rulings of a trial court and, therefore, that it will draw all inferences permissible from the record, and, in determining whether the evidence is sufficient to sustain a conviction, will consider that evidence, in the light most favorable to the prosecution.

Henderson v. United States, 143 F. (2d) 681 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Borgia v. United States, 78 F. (2d) 550 (C.C.A. 9th), certiorari denied, 296 U.S. 615, 56 S. Ct. 135;

Morrissey v. United States, 67 F. (2d) 267 (C.C.A. 9th), rehearing denied, 70 F. (2d) 729, certiorari denied, 293 U.S. 566, 55 S. Ct. 77;

McFee v. United States, 206 F. (2d) 872 (C.A. 9th), certiorari denied, March 15, 1954.

An appellate court in making its determination is in no way concerned with the weight of the evidence

inasmuch as questions of credibility are a matter for determination in the trial court.

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Newman v. United States, 156 F. (2d) 8 (C.C.A. 9th), certiorari denied, *sub. nom. Cain v. United States,* 329 U.S. 760, 67 S. Ct. 115.

The proof in a criminal case need not exclude all doubt but need go no further than to reach that degree of probability where the general experience of men suggest that it has passed the mark of reasonable doubt.

Henderson v. United States, 143 F. (2d) 681, 682 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. (2d) 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83.

II.

THE ESSENTIAL INSTRUCTIONS TO THE JURY WERE CORRECTLY GIVEN AND ADDITIONAL INSTRUCTIONS REQUESTED WERE PROPERLY DENIED.

The entire instructions of the court to the jury are reproduced herein in the appendix attached hereto.

A. The Instructions Given.

Appellant objected to the following portion of the Judge's charge:

> "So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty." (R. 483.)

The court repeatedly instructed the jury that it was their duty to pass on the facts in the case. The charge read as a whole amply advised the jury of the rights of the defendant, burden of proof, presumption of innocence, and elements of the offense. The charge clearly demonstrates that the trial judge scrupulously emphasized to the jury that it alone had the sole responsibility of determining the facts and judging the credibility of witnesses, and that the jurors were to disregard any comments or observations of the court bearing on this matter.

It is clear enough that in the federal courts, questioning and comments on the evidence by the trial judge are not *per se* beyond the bounds of judicial propriety. *United States v. Aaron,* 190 F. 2d 144 (C.A. 2d), certiorari denied, *sub nomine Friedus v. United States,* 342 U.S. 827; *Quercia v. United States,* 289 U.S. 466, 469; *Glasser v. United States,* 315 U.S. 60, 82; *Kettenbach v. United States,* 202 Fed. 377, 385

(C.A. 9th), certiorari denied, 229 U.S. 613; *Henry v. United States,* 273 Fed. 330, 340 (C.A. D.C.), certiorari denied, 257 U.S. 640; *Cusmano v. United States,* 13 F. 2d 451, 452 (C.A. 6th), certiorari dismissed, 273 U.S. 773; *United States v. Warren,* 120 F. 2d 211, 212 (C.A. 2d); *Simon v. United States,* 123 F. 2d 80, 82 (C.A. 4th), certiorari denied, 314 U.S. 694; *Todorow v. United States,* 173 F. 2d 439, 448 (C.A. 9th), certiorari denied, 337 U.S. 925. As succinctly stated by the Court of Appeals for the Fourth Circuit in the *Simon* case (p. 83):

> "It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other."

Appellant cites the recent case of *Olender v. United States* (9th Cir., 1954) 210 F. 2d 795, in support of his contention that the instruction given shifted the burden of proof from the Government to appellant. This court did not reverse the *Olender* case solely on the question of instruction. What this court said was:

> ". . . The challenged instruction, considered as a part of the lower court's charge as a whole, would not, in itself, be sufficiently prejudicial to

require a reversal, but it must be considered along with the other errors committed at the trial."

The appellant next contends that the instruction took from the jury the question of whether the Government's evidence established the charge beyond a reasonable doubt. (App. Br., p. 34.)

In a recent case, *Holland v. United States,* 209 F. 2d 516, decided January 21, 1954, the Court of Appeals for the Tenth Circuit had occasion to consider the question of reasonable doubt and stated, at page 522:

> "[11, 12] There are many definitions of 'reasonable doubt'. Some courts assert that the words themselves carry their own best definition and that any attempts at clarification or definition tend only to confuse an otherwise simple phrase. See 20 Am. Jur. Evidence, Sec. 1257; 53 Am. Jur. Trial, Sec. 751; 36 Words & Phrases, Reasonable Doubt, pp. 297, 319; Wigmore on Evidence, 3rd Ed., Vol. IX, Sec. 2497. Under the federal rule, however, the accused is entitled to a definition of the term 'reasonable doubt', and failure to instruct upon request has been held to constitute error. Nanfito v. United States, 8 Cir., 20 F. 2d 376; Blatt v. United States, 3 Cir., 60 F. 2d 481; Egan v. United States, 52 App. D.C. 384, 287 F. 958; Mundy v. United States, 85 U.S. App. D.C. 120, 176 F. 2d 32; Schencks v. United States, 55 App. D.C. 84, 2 F. 2d 185. But, a proper definition of the term does not depend upon the observance of a ritual or the use of precise words found in some accepted definition. United States v. Schireson, 3 Cir., 116 F. 2d 881, 132 A.L.R. 1157; United States v.

> Stoehr, D.C., 100 F. Supp. 143, affirmed, 3 Cir., 196 F. 2d 276. It is sufficient if the jury is given to understand that reasonable doubt as applied to the measure of its persuasion means a real or substantial doubt generated by the evidence or a lack of it; and that beyond a reasonable doubt means to a reasonable or moral certainty. Wigmore, supra, Sec. 2497.
>
> [13] While the Court's definition of 'reasonable doubt' may not be a model of clarity and conciseness, we think it does suffice to convey the legally acceptable meaning of the term."

Appellant's own opening brief, at page 13, shows that a profit of over $11,000 was derived on a carload of Old Mister Boston Rocking Chair whisky, even assuming appellant paid $25 per case over the ceiling and sold it at $60 per case. There was ample evidence for the jury to find that the Government's case had been established beyond a reasonable doubt.

Appellant also relied on the case of *Bihn v. United States,* 328 U.S. 633, to support his contention that the questioned instruction was erroneous. This case is distinguishable from *Bihn v. United States,* where the question was an entirely different matter. In the present case, the Government proof established beyond a reasonable doubt a profit of over $100,000 to appellant, and the only evidence in the record of the alleged bonus payments is the uncorroborated story of the appellant.[5]

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[5]In the first trial there was a sharp conflict of testimony because Gersh stated that the bonuses to him were in reality advances for him to purchase equipment for the appellant, which he did. *Wolcher v. United States,* 200 F. 2d 493.

The ultimate question in cases of this sort is whether the jury has been left free to perform its fact finding functions. The complained of instruction, read in the light of other instructions, was not objectionable or improper and, even standing alone, was a correct exposition of the law.

Appellant had conceded and admitted the prima facie elements of the Government's case—that he engaged in the sale of liquor in the black market, that sales amounted to something over $300,000, and that no part of the transactions was reflected on his books, which were the basis of his income tax return. Since that was admitted, then there is only one issue—was there a net profit derived? There was admittedly a profit derived so far as all available records of the transactions showed; i.e., the difference between the invoice price from the distributor and the retail sales price received by the appellant showed a profit of over $100,000, which, admittedly, was not shown on his income tax return and on which no tax was paid.

Clearly, if the case was to be decided on the admitted facts, appellant was guilty, unless there was additional expense which resulted in no profit being realized. The only evidence of any such admitted expense came from the unsupported word of the appellant himself. The only question remaining, after considering the admissions, was whether the appellant's story of his additional cost was believable, for, if it was not believed by the jury, at least to the extent of raising a reasonable doubt of guilt, *the admitted*

facts justified conviction. If it was believed, then, of course, the jury should acquit. The case was as simple as that, and that was what the instruction explained to the jury. Upon appraisal of the whole record and the instructions in this case, it is plain that the complained of instruction was well within the proper function of the trial court and that the remarks were in no way improper.

B. The Instruction Denied.

It is well settled that when a trial court gives all of the essential instructions a defendant is not entitled to any additional instructions. *Caminetti v. United States,* 242 U.S. 470.

The defendant in this case is charged with failure to report additional net income of $35,484.40. The Government does not have to prove the exact amount of the unreported income. *United States v. Johnson,* 319 U.S. 503, 507.

The question presented, therefore, is "Did the trial court's instruction properly cover the definition of net income?" If the court's instruction did cover the definition of net income, the requested instruction was properly denied. The court's definition of net income was as follows:

> "Now what do we mean when we speak about net income? Well, there is of course a very simple definition of it. Most of the men on the jury, I think, have heard it stated—maybe the ladies not so often, unless you are following some occupation—that it means the gross income, the total

income that a man has, less the deductions or expenses or expenditures that the law says he can take from it; then what he has got left is his net income. Now that's what the defendant is charged in this case with non-payment of, is the net income. Now the taxable income of an individual includes anything by way of a gain or profit or income that he might get from salaries or wages, business, compensation for personal services, from trade or business, or sales or dealings in property; and it also includes any profit or income, net in character, that [513] a man would obtain from any illegal transaction as well as a legal transaction. He has to account for all of his net income to the United States." (R. 481.)

* * * * * * *

"The defendant, on the other hand, admits that the black market transactions were had by the defendant, but contends that he made no profit in connection with these transactions and that therefore he had no net income and that therefore he is not chargeable with any evasion of income taxes; that he made no profit in the matter, because he had to pay out certain monies in connection with the transactions and that therefore the net result was that he had no profit in the matter, and that therefore he is not chargeable with a violation of federal statute. * * * If you believe his story, then you should return a verdict of not guilty." (R. 483.)

In the face of this instruction the jury could not, as suggested by Appellant (App. Br. p. 39) come to the conclusion that any money received by Appellant

over the invoice price constituted taxable income. It was made perfectly clear that Appellant's cost of the liquor should include any over-ceiling payments they might believe he had made.

It is apparent that taxable income, as involved in this case, was adequately defined by the court's instructions.

III.

THE DISTRICT COURT DID NOT ERR IN SUSTAINING OBJECTIONS BY THE GOVERNMENT TO QUESTIONS ASKED OF APPELLANT ON DIRECT EXAMINATION REGARDING APPELLANT'S CONVERSATIONS WITH WILLIAM GERSH IN THE SPRING OF 1943.

In point IV of his argument, based on specification of error No. 3, appellant contends (Br. 56-60) that the district court erred in excluding appellant's conversation with William Gersh in the Spring of 1943.

A short answer to appellant's argument is that the substance of the conversation with Gersh in the Spring of 1943 is in the Record at page 382, as follows:

> "Q. And in your first conversations with Mr. Gersh did you ask him to get any liquor for you or did he offer to get it for you?
>
> A. Well, I made the offer very easy. I mentioned the shortage of whisky here, and he told me that he knew—he had lots of friends in the liquor business, he could get it for [407] me.
>
> Q. That was the first time?
>
> A. I believe I brought up the conversation.

Q. Did you in that conversation tell him what you had just paid to get some liquor?

A. Yes, I did.

Q. What did you tell him?

A. I told him I had just paid——

Mr. Schnacke. If your Honor, please, I have sat back without objecting and all of the conversation has gone in——

The Court. Just make your objection.

Mr. Schnacke. I must object at this point.

The Court. It is a self-serving statement.

Mr. Schnacke. To this as hearsay and as a self-serving statement.

The Court. I will sustain the objection.

Q. (By Mr. Friedman) In your conversations with Mr. Gersh, who mentioned the over-ceiling price that should be delivered to Mr. Gersh?

A. He did.

Q. He did?

A. Yes, sir.

Q. He fixed that, is that correct?

A. Yes, he fixed it."

Mr. Wolcher's testimony in the first trial does not add to the substance of the above-enumerated conversation. (No. 12,992, R. 442.)

"Q. I see. And what else was said in that conversation?

A. I told him that I would—to line some up for me and I would be glad to get it.

Q. Yes? What did he say to that?

A. Said he would make an effort to do so.

Q. I see. Now was anything said about money at that time?

A. Yes, he said previously 'for that kind of money,' referring to the $20 a case that I had been paying, that I had paid over for the Old Brook whiskey. He said for that kind of money he could get me all the whiskey in the world.

Q. I see. Was anything said about where that kind of money was to be paid or to whom?

A. Yes.

Q. What did he say?

A. To him.

Q. To him?

A. He would make arrangements for me to get this whiskey.

Q. I see. Now as a result of that conversation did you deliver or pay or send to Mr. Gersh any money?

A. Yes, I did."

It is to be remembered that this case involved a charge of evasion of taxes by the appellant and that a showing had been made in the Government's case in chief that the appellant had engaged in a widespread black market liquor operation involving the sale of some 5138 cases of liquor at prices in excess of ceiling and invoice prices with part of the payments having been made by check to represent the invoice price and the over invoice price being paid in cash.

The appellant's contention at the trial was that he had made no profit on these black market transactions by reason of the fact that he had paid over to William Gersh all of the over ceiling money col-

lected by him in cash. In an effort to support appellant's contention at the trial appellant sought to introduce a conversation held between appellant and Gersh at some time during the spring of 1943. He was permitted to testify to the fact that there was a conversation between himself and Gersh and that pursuant to the conversation he had sent money to Gersh to acquire whiskey after which whiskey was delivered. (R. 358.) He testified to the details of receiving the liquor, to the amounts of money that he sent Gersh, that the money was paid to be applied against the overage of the whiskey, that is, the over ceiling price, that his arrangement with Gersh was to pay $20.00 a case over the invoice price in order to get whiskey until Gersh raised the price to $25.00 a case, that none of the money was transmitted to Gersh to pay any part of the invoice price of the whiskey, that various amounts of money had passed back and forth between appellant and Gersh. (R. 356-365.)

An objection was properly sustained to a question "and what conversation did you have with Mr. Gersh at that time" referring to an alleged conversation held between appellant and Gersh in the spring of 1943 before the first shipment of liquor was sent from the east. This question, of course, called for hearsay and self-serving declarations by appellant. What appellant may have stated to Gersh in the spring of 1943 certainly had no probative value in determining whether or not the tax return filed by

appellant in October of 1944 was or was not fraudulent, any more than does the alleged statements of Gersh made on the same occasion.

The issue in the case was not what agreement the appellant had or claims to have had with Gersh but was rather what he did in connection with any such agreement if he did anything. The appellant was attempting to prove that he had sent money to Gersh in payment of the over ceiling price on liquor. Quite clearly what might have been said during the course of an alleged conversation prior to the alleged shipments of money or of liquor was not probative of the fact that money had been sent or that liquor had been delivered pursuant to the payments of money.

Appellant's only suggested reason for the admissibility of this conversation is the bald statement that it was not hearsay. Quite clearly any extrajudicial statement reported in a judicial proceeding is hearsay. Under certain well settled exceptions it may be admissible hearsay, but the appellant has failed to point out any exception to the hearsay rule under which this conversation might be admissible.

The appellant cites the case of *Sparks v. United States* (6th Cir. 1917) 241 Fed. 777, 791 as authority for the proposition that the entire text of the conversation, rather than merely the fact that a conversation was held, is admissible in evidence. Appellant has overlooked the distinction between the conversation in the *Sparks* case and the conversation in the present case. In the *Sparks* case the issue before

the jury was the intent with which Sparks had done certain acts. He claimed that the acts were done with an innocent intent because a certain conversation had given him reason to think the actions were innocent. As the Court there said "the purpose of the offered testimony was to rebut fraudulent purpose." Wolcher's conversation with Gersh was offered in the present case for a far different purpose. The question here was not what may have *motivated* Wolcher's payments to Gersh but *whether or not any such payments were made.* While it is true that such a conversation might be admitted to show motivation, it is inadmissible hearsay on the question of whether or not money was actually paid to Gersh.

Moreover, this Court's opinion in the previous trial, *Wolcher v. United States,* 200 F. 2d 493, at par. 4, shows that there was a sharp conflict on the subject as to why the money was actually paid:

> "Gersh was called as a rebuttal witness for the Government and while he stated that in 1943 he had handled money belonging to Wolcher in amounts totaling $85,000, his version was that the money was sent to him to obtain coin machines for Wolcher. His testimony was that at that time coin machines were very difficult to procure, and that they could be bought only by cash payment in advance of the full purchase price. This, he said, was why Wolcher sent him these sums of money. He testified that he bought ten phonographs for Wolcher during this period, the purchase amounting to $5250, but that he had returned all the balance of the $85,000 to Wolcher."

It is clear that the conversation was not admissible, but in any event, to prolong discussion on the point is unnecessary, since the substance of the conversation is in the record despite the objection sustained.

IV.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO REOPEN THE CASE.

There is no merit to appellant's fourth specification of error. The Court did not err in refusing to reopen the case to allow appellant to call William Gersh as a witness. Appellant was fully aware of the fact that Gersh had been called as a witness at the first trial of the case and was fully aware, of course, of the testimony given by Gersh on that occasion. Appellant had every opportunity to place Gersh under subpoena and, as a matter of fact, appellant had seen Gersh within the year before the trial, received every week the magazine Cash Box published by Gersh and was aware of the fact that Gersh resided in the immediate area around Chicago. (R. 391.) Under these circumstances both the nature of Gersh's testimony and Gersh's whereabouts were as well or better known to appellant than they were to the Government and, if Gersh was thought to be an essential witness for appellant, there was no justification for appellant's failure to have Gersh under subpoena.

It is well established that the right to reopen a case, after the case has been closed, lies within the discretion of the trial court.

Horowitz v. United States, 12 F. 2d 590, certiorari denied, 273 U.S. 697 (5th Cir., 1926);
Brink v. United States, 60 F. 2d 231, certiorari denied, 287 U.S. 667 (6th Cir., 1932).

There is no abuse of the trial court's exercise of its discretion in refusing to permit a party to reopen its case where the party has full knowledge of the nature of the testimony and the whereabouts of the proposed witness in sufficient time to have placed such a witness under subpoena in order to enforce his attendance at the trial.

Alexis v. United States (5th Cir., 1904), 129 Fed. 60;
Kalen v. United States, 196 Fed. 888, (9th Cir., 1912);
United States v. Stimson, 52 Fed. Supp. 425 affim'd, 141 F. 2d 664;
Eyer v. Brady, 128 F. 2d 1012, certiorari denied 317 U.S. 679.

It is interesting to note that out of the hundreds of cases involving the question of the propriety of permitting or refusing to permit the reopening of the case by one or another of the parties, no case has been found in which the action of the trial judge, in which ever way his discretion happened to be exercised, has been questioned by an Appellate Court or found to be grounds for reversal.

Appellant apparently makes a point of the fact that appellant was not aware of the presence of the witness in San Francisco until shortly before the time the

request was made to have the case reopened to call him as a witness. This, of course, is no answer to the failure of the appellant to have obtained process to secure a known witness whose known testimony the appellant now claims was essential to the establishment of his case. There is no validity to appellant's suggestion that appellant had a right to rely upon the Government to call for the benefit of the appellant a witness whom the appellant deemed essential.

The Federal cases cited by appellant fail to support appellant's contention that there was any abuse of the trial court's discretion.

United States v. Maggio, (C.C.A. 3rd), 126 F. 2d 155,

is a case in which the exercise of discretion by the trial court was approved and it merely establishes the principle that the reopening of a party's case is proper where the party failing to call a witness had no sufficient prior opportunity to place the witness under subpoena. The court there said "* * * The fact that that testimony was not available to the Government until a few minutes before it was offered makes it clear that the court's action was quite proper."

The appellant makes considerable point of colloquy occurring during the course of which counsel for the Government expressed the opinion that some rebuttal witnesses would be called, (appellant's opening brief pages 52 and 53), but the brief fails to point out that

this conversation occurred after a representation by counsel for the appellant that at least one additional defense witness would be called (R. 453-4). It was only after the failure of appellant to call any additional witnesses that the prosecution rested.

The Government is under no obligation to call witnesses in order to have those witnesses available for the appellant. The case of *Sullivan v. United States,* 9th Cir., 32 F. 2d 992, cited by the appellant concerned a far different situation from the one present in this case. There the witnesses were in custody at a county jail and would have been returned to penitentiaries upon their release from Government subpoenas, and the case suggests the propriety of the Government advising the appellant of the fact that these witnesses were to be available only for a short time. However, that case dealt not with the propriety of reopening a case or of retaining government witnesses for the benefit of the other party, but rather the propriety of a comment by the prosecuting attorney in the presence of the jury to indicate to the jury that these witnesses were available to the defense.

The appellant has also cited the case of *Hayes v. Viscome* (Calif.) 122 A.C.A. 167. It is sufficient to point out that the circumstances of that case were substantially different from those in the present case. There, as the court stated, the party "could not have known this (that a certain witness had to be called) unless they had known that defendants did not intend to call him and to assume this would be to assume

that defense counsel knew that the doctor's testimony would be adverse."

No assumptions regarding the testimony of Gersh had to be made by appellant here. Gersh had been exhaustively examined and cross-examined at the first trial and the extent and necessity of his testimony were fully known to appellant long before the time within which witnesses should have been subpoenaed for the second trial. In view of the fact that the knowledge of the facts of the case by appellant's counsel, who had participated in the trial of the first case, was far superior to that of the prosecuting attorney, who had not, appellant's claim that there was a "suppression of evidence" on the part of the prosecutor, seems very hollow.

It is noted that appellant's opening brief and appellant's closing brief in the previous trial (No. 12,992) relies to some extent on the sharp conflict of testimony between Gersh and Wolcher. Appellant's closing brief (No. 12,992) at page 2 states:

> "It seems unnecessary to state further details concerning the conflicts of testimony between Gersh and Wolcher. It is sufficient to say that both witnesses were examined in great detail. In the light of the jury's verdict of guilty, it can only be assumed that they believed Gersh and disbelieved Wolcher."

It further states:

> "The foregoing statement is in strict accord with appellant's contention herein. The jury had to decide whether Gersh or Wolcher was testifying to the truth."

In view of the foregoing, there seems to be no merit to appellant's last specification of error, because in the previous trial the defendant and appellant's brief was based in substantial part, upon the contention that Gersh's testimony should not be believed by the court.

Now to contend to this court that Gersh's testimony would have fully corroborated the appellant's version of the facts and that this court should reverse the case for a second time because Gersh was absent seems without foundation in reason.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment and sentence of the trial court should be affirmed.

Dated, San Francisco, California,
June 1, 1954.

LLOYD H. BURKE,
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ROBERT H. SCHNACKE,
Assistant United States Attorney,
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(Appendix Follows.)

Appendix.

Appendix

SPECIFICATION OF ERROR NO. 1.

INSTRUCTIONS TO THE JURY. (R. 473-486.)

Now the part that you play here is to determine the question of fact that is presented. That's exclusively your function. In a criminal case the question of fact which a jury has to determine is, Is the defendant guilty or not guilty of the charge that is made against him? You have the final word in that regard. Judges do not interfere with that function. It sometimes happens that in some cases where it is deemed advisable, a judge may make some comment upon the evidence or its weight; if he does so to point out what he thinks is in the interest of justice, and a matter of importance to be called to the attention of the jury. But even in such cases the jury is in no way bound by the comment of the judge and should come to its own conclusion with respect to such matters. I mention that because I may make one comment concerning the evidence in this case.

You are not to conclude from anything that I may have said during the course of this trial that I was intending to indicate to you in any way what your verdict should be. A judge is called upon to make rulings on evidence, at times to admonish witnesses, and at times he may propound some interrogatories himself to witnesses. But those actions on the part of the judge are not for the purpose of conveying any intimation to the jury as to what its verdict

should be, but only pursuant to the court's power and indeed its duty to supervise the trial of the case and to expedite it where possible. So you cannot obtain from me in this case any indication of what I think your verdict should be. Some jurors hopefully look for such hints—they just think, maybe, that makes their task somewhat easier. But you have no such hints from me and you must make your decision yourselves.

Now the judge has the duty of telling you what the law is for the purpose of assisting you in appraising the testimony, so that you may come to a just conclusion. In that field the Judge is supreme, just as you are in the field wherein you alone may make the decision as to guilt or innocence. You have to assume, rightfully or wrongly, that the judge knows what he is talking about when he tells you what the law is, and you have to follow that. I state that to you because some men and women do come into a jury box with some preconceived notions upon social and economic theories, and sometimes legal theories, and they say, "Well, I think the law should be so and so, and so I am going to decide the case that way." That is not permissible and in fact it is wrong, because we have found that it is not in the interest of justice that that be done. It is not the function of the jury; therefore, you must accept what statements of law the judge makes to you as final and binding upon you.

Now while we have somewhat different functions to perform—you deciding the guilt or innocence of

the defendant and the judge advising you as to the law in order to help in your decision, nevertheless we are in a sense a team, because while we have different functions to perform, we both of us—that is, the jury and the judge—have the same objection, and that is to accomplish justice. That is what we are here for.

Now in your deliberations in this case it is your duty to exclude all considerations of either prejudice or sympathy. You cannot render a verdict because of any sympathy for the defendant, and likewise you cannot render a verdict against him because of any prejudice connected with the evidence in the case. Both of those matters must be excluded in your deliberations. You should not concern yourself with the matter of the punishment of the defendant in the event he is found guilty, because the matter of punishment is reserved by law exclusively for the judge who presides in the case.

Now this is an important case, ladies and gentlemen. It is a serious case to both the Government and the defendant. Indeed it may be said that all cases wherein the life, liberty or property of individuals are at stake are serious and important cases. And so this is for that reason an important case. There are a few general rules that are applicable to all criminal cases that may help you in arriving at a decision in this case. I shall give you a few of them, very briefly and perhaps somewhat colloquial.

I have followed the practice for a number of years of not reading instructions to juries, long-winded legal, technical statements. I have an abiding conviction that a judge should talk to a jury in simple language, because the jury is brought in, as it were, from the streets to the courtroom. It is not familiar with technical language. A judge should talk to the jury in the language that jurors use in their everyday activities. And so what I have to say to you may not read very grammatically hereafter, but I think you will understand it better than if I were to give you a lot of technical, highfalutin' explanations of matters that are really quite simple.

I told you when you were impaneled that there was no presumption that arises because the Grand Jury filed an indictment in this case, that the defendant is guilty of the charge. I repeat it to you now. There is no such presumption. To the contrary, the presumption is that the defendant is innocent and that presumption continues until such time as the Government has proved the guilt of the defendant beyond a reasonable doubt. The Government has the burden of proving the guilt of the defendant. That burden never shifts at any stage of the proceeding to the defendant. The defendant has no obligation of any kind to go forward and prove that he is innocent —as is true in some continental systems of law.

Now I have told you that the Government must prove that the defendant is guilty beyond a reasonable doubt before you may find such a verdict. Now what

do we mean when we say, "Beyond a reasonable doubt"? The explanation that I give juries is a very simple one, I think, and that is that a reasonable doubt is a doubt that is based upon reason. It is a doubt that arises as a result of you using your heads, your thinking processes. It is not a doubt that's imaginary or speculative or captious—something that you sort of reach up into the sky to get. It is a doubt that results after you have put your minds to the task of deciding the case. It is the kind of a doubt that you would have if you were called upon to decide some very important and vital matter in your own lives, and you hesitated and paused before you made your decision. That's the kind of a doubt that we speak of as a reasonable doubt. It might be stated somewhat differently by saying that if you were in doubt to this extent, that you could draw some inference of guilt as well as an inference of innocence from the facts in the case, that of course in such a case you should draw the inference of innocence, because then you wouldn't be convinced beyond a reasonable doubt by the evidence in the case.

Now whether or not you believe the witnesses who have testified in this case and the weight that you wish to give to their testimony respectively is a matter for your exclusive decision. We start out in every case with the presumption that when somebody comes up and sits in this chair and takes the oath, that he is going to tell the truth. However, that presumption can be negatived or rebutted by a number of things.

It can be negatived by the manner in which the witness testifies, by the demeanor of the witness on the witness stand, by whether or not the witness contradicts himself, whether he is contradicted by the testimony of other witnesses, by the interest that he has in the case, by his relationship to one side or the other in the case; you can determine the credibility of the witness by all of these things, including the witness' criminal record, if any. And it is upon the basis of all of those factors that you determine how much weight you may give to the testimony of a witness. In addition you may consider—and it is important—whether or not the witness has testified falsely in any material respect. If it seems to you clearly that a witness has made a false statement in some material matter, then you can throw out and disregard all of his testimony, and you don't have to give any credence to anything that he said. That, however, is dependent upon whether or not you have concluded that he has testified falsely in some material matter.

Now it is your duty to disregard any testimony that the court has stricken or any testimony in the case where an objection to a question has been sustained.

I call your attention to the fact that the lawyers have argued this case to you. That's their right and indeed their duty to their respective clients and principals. If it should appear to you that there is any discrepancy between the statement of facts made by the lawyers in their argument and the evidence as you recall it as having been given by the witnesses,

then you will throw out and disregard the testimony as stated to be the testimony by the lawyers and take into account only the evidence as you recall it as having been given by the witnesses themselves.

Now you should use your good sense, your common sense in deciding this case. You are not, as one of my older colleagues once said, to leave your common sense outside and check it in some room; you bring it in here with you and you use it. You should resolve the case with a calm and deliberate and cautious judgment in the light of your own understanding and knowledge of how human beings act and conduct themselves. You should remember at all times that the defendant is entitled to any reasonable doubt that you may have in your minds, but at the same time you should remember that if you have no such doubt, then the Government is entitled to a verdict.

The defendant in this case has testified in his own behalf for himself. That being so, you will judge his testimony the same as the testimony of any other witness, applying the standards that I already have given you. In addition, and in the case of a defendant, you may consider his interest in the case, his hopes and his fears and what he has to gain or lose by whatever verdict you may render.

Now the issue in this particular case, Members of the Jury, in my opinion, resolved itself down, as frequently happens, to perhaps what may be colloquially said to be a rather simple question. The indictment in this case charges the defendant with wilfully and

knowingly attempting to defeat and evade a large part of his income tax for the fiscal year ending June, 1944. The amount by which his net income is alleged to have exceeded the amount he reported on his return was approximately $45,000, as alleged in the indictment. The indictment was filed pursuant to a federal statute which makes it a criminal offense for any person to wilfully attempt in any manner to evade or defeat any tax imposed by the revenue laws of the United States. Now the defendant plead not guilty to that charge, and so that's the issue. Did he wilfully and intentionally attempt to evade the payment of income taxes due the United States for this fiscal year ending in June, 1944?

Now the Government has the burden of proving that the defendant had taxable net income which he did not report, and that his act in so doing, failing to report it, was wilful and intentional.

Now what do we mean when we speak about net income? Well, there is of course a very simple definition of it. Most of the men on the jury, I think, have heard it stated—maybe the ladies not so often, unless you are following some occupation—that it means the gross income, the total income that a man has, less the deductions or expenses or expenditures that the law says he can take from it; then what he has got left is his net income. Now that's what the defendant is charged in this case with non-payment of, is the net income. Now the taxable income of an individual includes anything by way of a gain or

profit or income that he might get from salaries or wages, business, compensation for personal services, from trade or business, or sales or dealings in property; and it also includes any profit or income, net in character, that a man would obtain from any illegal transaction as well as a legal transaction. He has to account for all of his net income to the United States.

Now whether or not the act of failing to account for and the evasion of income tax payments is wilful or not is to be determined from all of the evidence in the case. It is not necessary for the Government to prove directly wilfulness. It may be inferred from all of the evidence in the case, including the acts and declarations made by the defendant and any other acts, circumstances in the evidence which relevantly bear on the question of the state of mind or intention of the defendant.

Now it is not necessary for the Government to prove the exact amount of the evasion, if any, nor the exact amount charged in the indictment. It would be sufficient if the Government shows that a substantial amount of money, consisting of net income, was wilfully evaded by the defendant in the case.

Now I think it might be well if I very briefly stated to you what the Court believes is the issue of the case as it appears from the contentions respectively of the parties—the Government on the one hand and the defendant on the other hand. The Government contends, as appears from the argument made by

Government counsel, that the cash monies that the Government proved the defendant received from the sale of liquor and which the defendant admitted that he received, were income and were net income, and that the whisky was purchased for the purpose of making a profit on it in its resale and not for the benefit of the defendant's own taverns, or his friends'. The Government contends that there were no records of the transaction kept by the defendant, and that that was so that he could keep the proceeds without paying any tax on them. The Government contends, that there were no records of the transaction kept by the defendant, and that that was so that he could keep the proceeds without paying any tax on them. The Government contends, as stated by the Government lawyer, that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated and should not be believed by you. That, I think very briefly, is the Government's contention.

The defendant, on the other hand, admits that the black market transactions were had by the defendant, but contends that he made no profit in connection with these transactions and that therefore he had no net income and that therefore he is not chargeable with any evasion of income taxes; that he made no profit in the matter, because he had to pay out certain monies in connection with the transactions and that therefore the net result was that he had no profit in the matter, and that therefore he is not chargeable with a violation of federal statute.

So that in my opinion brings the issue of the case down to a very simple, and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty.

The defendant is not on trial in this case for violations of the price ceilings. The evidence shows in this case that he had already plead guilty to a charge brought in this court, and therefore he is not on trial again for that same offense. You may, however, take into account in determining whether or not there was an evasion of payment of income taxes, the nature of the transactions, the illegality of the transactions involved and also the matter of the failure to keep records and to enter these transactions on his books. Those are factors which you can take into account and which the Court considers are important factors to take into account in determining whether or not there was a violation of the law.

The last comment that the Court has made is not in any way binding upon the Jury. I am merely pointing out to you what in the opinion of the Court are important questions to be determined in connection with the resolution of the issue of guilt or innocence of the defendant. You are not bound by them

in any way and you come to your own conclusion in the matter. If you regard them as not important, you won't hurt the Court's feelings at all in coming to a different conclusion, because that is entirely your function, and you make your own decision in the case.

I want to call your attention before I conclude to the fact that you are not to take into account the fact that there has been any previous trial in this case, except insofar as there was reference to the testimony or records introduced in this case, that were referred to as having been introduced in another case. But what the outcome of the other case was and why it is being retried now is not a matter that you take into account either for or against the defendant in this case. You judge this case solely and exclusively upon the basis of the evidence that has been presented here.

Now, ladies and gentlemen, I think I have given you about all the advice and information that I think will be of help to you. If you can conscientiously do so, you are expected to agree upon a verdict in this case. The defendant is entitled to the independent judgment of each one of you when you go to the jury room to deliberate. However, you should freely consult with one another in the jury room. If any one of you should be convinced that your view of the case is erroneous, you shouldn't be stubborn and you shouldn't hesitate to abandon your own view under such circumstances. However, on the other hand, it

is entirely proper to continue to adhere to your own view if, after a full exchange of ideas, you believe that you are right. Whenever all of you have agreed to a verdict, it is the verdict of the jury. Your verdict must be unanimous. You should not return to the courtroom with a verdict unless in the jury room all of you have agreed to it.

When you retire to deliberate, you will select one of your number as foreman or forelady, as the case may be, and he or she will preside over your deliberations in the jury room and will represent you in the further conduct of this case here and will sign your verdict for you when you have agreed upon it.

We have prepared a form of verdict for you. It is very simple. It reads: "We the Jury find Louis E. Wolcher, the defendant at the bar, (blank) as charged in the indictment." In the blank space you will write the words "guilty" or "not guilty", in accordance with the conclusion which you come to; and when you do that, your foreman will sign the verdict and that will be your verdict.

After you have retired to deliberate and have organized, selected a foreman and at any time that you wish thereafter to see any of the exhibits that have been introduced as evidence in the case, send word through the bailiff and the court will see that they are sent to you.

Are there any suggestions that counsel wish to make?

Well, Members of the Jury, it may be that I may want to either add something to what I have said to you. I want to consult with the lawyers about that first. So I will now ask you to take a brief recess. But bear in mind that the case is not yet submitted to you. You are still under the admonition not to talk about it among yourselves or to let anybody talk to you about it, and you should still not form or express any conclusions in the matter. I will keep you out just a brief time and bring you back and let you know whether or not the instructions are complete.

Will you take the Jury out?